FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 22 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 447

VAPOR BLAST MANUFACTURING COMPANY, a Wisconsin business corporation,

Petitioner,

vs.

ROSS M. MADDEN, individually and as Regional Director of Region 13, of National Labor Relations Board, and GERALD S. PATTERSON, individually, and as Counsel for the Office of the General Counsel of the National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

H. WILLIAM IHRIG
759 North Milwaukee St.
Milwaukee 2, Wisconsin

MILTON GERWIN
EARL A. GLICK
1 N. La Salle Street
Chicago 2, Illinois

MAX RASKIN
PHILIP L. PADDEN
606 W. Wisconsin Ave.
Milwaukee 3, Wisconsin

Attorneys for Petitioner
VAPOR BLAST
MANUFACTURING COMPANY

HAMMERSMITH NORTHMEYER CO. MILWAUKEE

INDEX

Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Rules and Regulations involved	3
Statement	3
Reasons for granting the writ	9
Conclusion	23
Appendix Ia—Judgment of Court of Appeals	1a
Appendix Ib—Decision of Court of Appeals	2a
Appendix II—Opinion of U.S. District Court	10a
Appendix III—Statutes quoted	16a
5 USCA, Sec. 22	16a
5 USCA, Sec. 1009(d) and (e)	16a
5 USCA, Sec. 1011	17a
28 USCA, Sec. 1254	17a
28 USCA, Sec. 1331	17a
28 USCA, Sec. 1337	18a
28 USCA, Sec. 1343(4)	18a
28 USCA, Sec. 2072	18a
28 USCA, Sec. 2201	18a
28 USCA, Sec. 2202	19a
29 USCA, Sec. 156	19a
29 USCA, Sec. 160(b)	19a
29 USCA, Sec. 160(e)	20a
29 USCA, Sec. 160(f)	21a
29 USCA, Sec. 526	22a

Page

Appendix IV—Rules and Regulations NLRB 23a
29 CFR—Rule 101.1 ..... 23a
29 CFR—Rule 101.4-8 ..... 23a
29 CFR—Sec. 102.94 ..... 26a
29 CFR—Sec. 102.95 ..... 27a

Appendix V—Federal Rules of Civil Procedure
Rule 12 (b), (c), (d), (g), (h) 29a
Rule 34 ..... 30a

Appendix VI
U. S. Constitution
Fifth Amendment 31a

Citations

Cases:

Gordon vs. United States (1953)
344 U.S. 414, 420 16

Greene v. McElroy (1959)
360 U.S. 477 14

Hickman v. Taylor (1947)
327 U.S. 495, at 507 14

Jencks vs. United States,
353 U.S. 657 17

Leedom v. Kyne (1958)
358 U.S. 184 18

Myers v. Bethlehem Shipbuilding Corp. Ltd.
(1938) 303 U.S. 41 22

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

VAPOR BLAST MANUFACTURING COMPANY, a Wisconsin business corporation,

Petitioner,

vs.

ROSS M. MADDEN, individually and as Regional Director of Region 13, of National Labor Relations Board, and GERALD S. PATTERSON, individually, and as Counsel for the Office of the General Counsel of the National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Vapor Blast Manufacturing Company, a Wisconsin business corporation, plaintiff and appellant below, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, issued June 30, 1960, affirming the October 14, 1959, order of the District Court of the Northern District of Illinois, Eastern Division, dismissing plaintiff's complaint for want of jurisdiction of the subject matter.

OPINIONS BELOW

The opinion of the Court below (Appendix I-b hereof, pp. 2a-9a) is reported in 280 Fed. (2) 205. The

opinion of the District Court, dated October 14, 1959, unreported to date in the Federal Supplements, is set forth at Appendix II hereof, on pages 10a-15a.

JURISDICTION

The judgment of the court below (Appendix I-a, *infra*, p. 1a) was entered on June 30, 1960. The jurisdiction of this Court is invoked under 28 USCA 1254 (1) set forth in Appendix III hereof, *infra*.

QUESTION PRESENTED

Whether, under the facts alleged in the complaint, a federal district court, prior to the final order of the National Labor Relations Board in an unfair labor practice matter, subject to the Court of Appeals review under 29 USCA, Section 160 (e) and (f) and 28 USCA, Section 2112, has jurisdiction over the subject matter of a complaint in a civil action which sought to invoke the jurisdiction of that court:

(a) Under 28 USCA, Section 2201, 2202,

(b) Under 28 USCA, Section 1331,

(c) Under 28 USCA, Section 1337,

(d) Under 28 USCA, Section 1343 (4) and

(e) Under the general jurisdiction of such court in proceedings in equity, and because plaintiff alleged causes of action justiciable before such court against the defendants, pursuant to the special provisions of:

(a) 5 USCA, Section 1009, and

(b) Under the several sections of the U. S. Constitution as therein set forth; (1) under the due process clause of the Fifth Amendment, and

(2) Under the provisions of Amendment Seven of the U. S. Constitution, guaranteeing that facts in a suit at law be finally determined by a jury trial.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended to September 14, 1959, and found in 29 USCA, Sections 156 and 160 (b), (e) and (f), and Section 526, and of other relevant statutes are set forth in Appendix III, *infra*.

RULES AND REGULATIONS INVOLVED

The pertinent rules and regulations of the National Labor Relations Board involved are 28 CFR, Sections 101.1 and 101.4, 101.5, 101.6, 101.7 and 101.8 and 102.94 and 102.95, in the form set forth in Appendix IV, *infra*.

The pertinent provisions of the Federal (District Court) rules and Civil Procedure involved herein are found in Rule 12(b), (c), (d), (g) and (h) and Rule 34, and are set forth in Appendix V, *infra*.

STATEMENT

The undisputed complaint of plaintiff in the United States District Court, set out on pages 2 to 11 of the Appendix to plaintiff's brief in the Court of Appeals, sets forth pertinent allegations asserting a justiciable cause in the U. S. District Court, as follows:

VII. That heretofore the defendant Ross M. Madden, as Regional Director aforesaid, received "charges" against plaintiff, and served same upon plaintiff as follows:

(a) Case No. 13-CA-3006 filed October 13, 1958, service on October 14, 1958

(b) A first Amended Charge in Case No. 13-CA-3006 was filed on January 30, 1959, and served on February 2, 1959.

(c) Case No. 13-CA-1343 was filed November 6, 1958 and served November 8, 1958

(d) Case No. 13-CA-1344 was filed November 6, 1958 and served November 8, 1958.

(e) Case No. 13-CA-1345 was filed November 6, 1958 and served November 8, 1958

(f) Case No. 13-CA-1346 was filed November 6, 1958 and served November 8, 1958

IX. That heretofore the plaintiff and its president, its shop superintendent and its general counsel, in writing, and under oath, answered the questions propounded to them on said several charges in said respective numbered cases before said Ross M. Madden, Regional Director as aforesaid.

X. That heretofore the plaintiff sought to make written answer to said respective charges in said several cases, but that it was not able to fully and fairly answer said charges because of the failure and refusal of said Ross M. Madden, Regional Director aforesaid, to allow the plaintiff to inspect and copy the affidavits of others, including the persons making the said charges aforesaid, as well as of other persons who are witnesses to the acts set forth in said charges, which said Ross M. Madden as said Regional Director, was required to consider in proceeding under the Statutes and Rules and Regulations applicable thereto.

XI. That plaintiff, in writing and in a timely manner, requested and demanded of said Ross M. Madden

the opportunity to inspect and copy said affidavits to be considered by him in proceeding on said charges against plaintiff.

XII. That on March 18, 1959, said Ross M. Madden, in writing, denied said plaintiff's application for said right to inspect and copy said affidavits in said cases, not made by plaintiff, as aforesaid.

XIII. That plaintiff, in writing and in a timely manner, moved before said Ross M. Madden, Regional Director, that he dismiss said charges because they were not supported by sufficient evidence as required by law and because they were contrary to the credible evidence and because said charges were not made in good faith.

XIV. That on February 14, 1959, the defendant Ross M. Madden denied and refused said motion to dismiss, duly filed with him by plaintiff.

XV. That on May 9, 1959, the plaintiff, in writing, duly appealed to the General Counsel of the Office of General Counsel of the National Labor Relations Board, said denials by said Ross M. Madden, Regional Director, of plaintiff's said application to him to inspect and copy said affidavits to be considered by said Ross M. Madden aforesaid, and on May 19, 1959, said plaintiff also duly appealed said refusal of said Ross M. Madden aforesaid, to dismiss said charges as aforesaid.

XVI. That on May 19, plaintiff, in writing, duly applied to the General Counsel of the Office of General Counsel as provided by the Rules and Regulations, for the right to inspect and copy said affidavits considered by said Ross M. Madden and by said Office of General Counsel of said National Labor Relations Board, in their considering the appeals of plaintiff and the motion to dismiss, aforesaid.

XVII. That on May 25, 1959, the Office of General Counsel denied said plaintiff's appeal: (1) to the aforesaid refusal of said Ross M. Madden to allow plaintiff to inspect and copy said affidavits to be considered by him, and (2) of said denial of plaintiff's motion to dismiss said charges, and it also denied plaintiff's separate application to it for such inspection and copying.

XVIII. That plaintiff cannot fully and fairly answer and respond to the charges in the cases aforesaid unless it has a reasonable opportunity to inspect the affidavits of others to be considered by said Ross M. Madden, Regional Administrator aforesaid, under the Rules and Regulations of the National Labor Relations Board, in attempting to make a settlement of said charges or in determining whether a complaint or complaints is authorized to be issued by him against plaintiff.

XIX. That the said failure and refusals of the defendant Ross M. Madden are contrary to the laws and regulations applicable to such matters, and that his failures and refusals are in excess and in violation of the duty in respect thereof imposed upon him by law.

XX. That such part of the Rules and Regulations of the National Labor Relations Board (being part 102.94) which prevents the said Ross M. Madden from allowing the plaintiff to inspect and copy said affidavits and statements in support of said charges in the within cases, in order to respond and answer thereto, is not authorized by law and is contrary to the "due process" clause of the Fifth Amendment of the United States Constitution, in that it prevents plaintiff, in being charged with a violation of law, in knowing the facts on which such charge is based and of impeaching such alleged facts and showing their lack of good faith.

XXI. That on or about March 24, 1959, the defendant Ross M. Madden, issued a complaint against plaintiff on each of said charges in said five cases aforesaid, without giving plaintiff an opportunity to fully answer and respond to said charges in said five cases and without enabling said Ross M. Madden thereby to have a full and fair answer to said charges and to have a full and fair record of investigation, as is required by the Rules and Regulations of the National Labor Relations Board, including parts 101.4-8, inclusive.

XXII. That on April 24, 1959, plaintiff was required by the defendant to make answer to said complaints received by plaintiff on March 25, 1959, but was not able to fully and fairly answer the same because of the failure and refusal of said defendant Ross M. Madden aforesaid to allow said plaintiff to inspect and copy the records of said investigation of said charges, but that plaintiff, in writing, reserved its rights in connection therewith.

XXVII. That plaintiff will be irreparably damaged unless said hearing on said complaint being proceeded on by defendants is restrained and enjoined until the within action is finally adjudicated.

XXVIII. That plaintiff will be further irreparably damaged unless said defendants are directed and required to allow said plaintiff to inspect and copy the affidavits in defendants' possession which were considered by said Ross M. Madden and by the said Office of the General Counsel on the appeals of plaintiff and on its consideration of plaintiff's motion to dismiss as aforesaid.

XXIX. That plaintiff will be further irreparably damaged unless, after said plaintiff is allowed to inspect and copy said affidavits in defendants' possession, it be given a further opportunity to respond thereto to said

defendants and that said defendant Ross M. Madden be required and directed to consider the said response of plaintiff thereto, for said Ross M. Madden as Regional Director, to consider said file under said parts 101.4-5-6-7-8 of the Rules and Regulations of said National Labor Relations Board and that said complaint of March 24, 1959 and proceedings thereon be stayed accordingly.

The above civil action complaint was filed on June 1, 1959, and on that date plaintiff's motion for preliminary restraining order as to the holding of the June 2, 1959, hearing on the administrative unfair labor practice charges complaint which was set for hearing at Milwaukee, was heard and denied by the U. S. District Court at Chicago on June 1, 1959, after Judge Julius J. Hoffman heard oral arguments of counsel for all the parties.

On June 2, 1959, the hearing on the formal complaint and answer of alleged unfair labor practices commenced at Milwaukee.

On July 30, 1959, the respondents prepared their motion to dismiss plaintiff's complaint and filed the same in the U. S. District Court at Chicago on August 3, 1959. The defendants' motion to dismiss, found on page 12 of the Appendix to plaintiff's brief in the Court of Appeals, reads as follows:

> "Defendants, by their attorneys, move the Court to dismiss the complaint on the following grounds:
>
> 1. The Court is without jurisdiction over the subject matter of the action;
>
> 2. The Court lacks jurisdiction over the General Counsel of the Board who is an indispensible party to the action.
>
> 3. The complaint fails to state a claim warranting relief.

Wherefore, it is respectfully requested that this motion be granted."

On September 14, 1959, the Labor-Management Reporting and Disclosure Act became effective and it enacted 29 USCA 526, which expressly made the Administrative Procedure Act applicable to "adjudications" under the National Labor Relations Act.

On October 14, 1959, after submission of written briefs for all the parties, U. S. District Judge Julius J. Hoffman rendered his oral decision for the dismissal of plaintiff's complaint on the basis that the District Court did not have jurisdiction of the subject matter of the complaint.

On June 30, 1960, the Court of Appeals entered its judgment based on its June 30, 1960, opinion, that the U. S. District Court did not have jurisdiction of the subject matter.

On motion of petitioner-appellant-plaintiff, the Chief Judge of the Court of Appeals successively extended the stay of the issuance of the mandate on such June 30, 1960, judgment until October 8, 1960.

REASONS FOR GRANTING THE WRIT

Petitioner contends that there are special and important reasons for the granting of its petition for writ of certiorari herein under the Statutes applicable thereto and under the rules of this court therefor, as a matter of sound judicial discretion:

1. The question presented here is of obvious importance in administration of the National Labor Relations Act because the decisions below disregard the opinions of this Court in *Hickman v. Taylor* respecting discovery and subsequent decisions including *Greene v. McElroy* respecting right of confrontation and cross-examination of witnesses.

Notwithstanding the provisions of 29 USCA Sec. 156, and notwithstanding the provisions of 29 USCA, Sec. 160(b), and notwithstanding the provisions of the rules and regulations duly promulgated by the National Labor Relations Board and applicable to the defendant Regional Administrator Ross M. Madden herein, as are found in 29 CFR 101.4, 101.5, 101.6, 101.7 and 101.8, the petitioner was denied the right to inspect and copy the affidavits of witnesses and the documents submitted by said witnesses in support of the charges of unfair labor practices being investigated by said Regional Administrator, Ross M. Madden, so that said petitioner was unable to fully reply thereto and so that said Regional Administrator could make a "full investigation" as imposed upon him before the issuance of the unfair labor practice charge complaint on said charges as was imposed upon him by 29 CFR 101.4-8, and so that a reasonable effort at compromise thereof could be entered into, as was imposed upon the Regional Administrator and the petitioner by said rules.

The jurisdictional requirement upon said Regional Administrator in issuing a formal administrative complaint of unfair labor practices against an employer required the compliance by said Regional Administrator with the provisions of said rules found in 29 CFR 101.4 and 101.4-8, which rules were promulgated by the National Labor Re-

lations Board under the applicable provisions of the Administrative Procedure Act, 5 USCA 1001-11.

Said rule 29 CFR 101.1 expressly sets forth that such rules were issued to comply with the provisions of the Administrative Procedure Act.

These rules supplement the provisions of 29 USCA 160(b) which authorize the issuance of a complaint on substantially supported charges of unfair labor practices.

Such interpretive rules promulgated by the National Labor Relations Board as are found in 29 CFR 101.1 and 101.4-8, are a jurisdictional requirement upon a Regional Administrator to receive and investigate, consider and attempt to settle charges of unfair labor practices as a conditional prerequisite to the issuance of a formal adversary administrative complaint, authorized to be issued under 29 USCA, Sec. 160(b).

Until the issuance of a formal complaint authorized under 29 USCA Sec. 160(b), before such matter can become an adversary proceeding of the public against the respondent therein, the authority of a Regional Administrator is prescribed by said rules and regulations found in 29 CFR Chapter 101, and such Regional Administrator is an investigator and mediator thereof in the interests of labor management peace and in the interest of unburdened interstate commerce.

The investigation and mediation under said rules found in 29 CFR 101.1 and 101.4-8, by the Regional Administrator of the verified charges of private parties seeking to invoke the formal assistance of the National Labor Relations Board is mandatory upon said Regional Administrator to his jurisdiction under the Statutes and rules he is authorized to operate under.

His right and duty to issue a complaint under 29 USCA 160(b) upon such private charges of alleged unfair labor practices is not absolute. His right to issue such a formal administrative complaint is not a matter of unbridled discretion but is subject to his precompliance with the interpretive Administrative Procedure Act rules found in 29 CFR 101.1 and 101.4-8.

Labor management peace in interstate commerce, which Congress has generally described in its Declaration of Public Policy in 29 USCA 151, is also a limitation upon the powers and duties of a Regional Administrator and prescribed the purposes of the provisions of 29 USCA Sec. 160(b) respecting the authority to issue an administrative complaint of unfair labor practices against an employer.

The purpose of Congress in expressly providing in 29 USCA Sec. 160(b) (Last sentence) for the application where practicable in such proceedings as are authorized in 29 USCA Sec. 160(b) of the Federal Rules of Civil Procedure, should not be limited in application to proceedings subsequent to the issuance of a complaint under 29 USCA Sec. 160(b) but also be applicable to the preliminary and jurisdictional steps of investigation and mediation to the issuance of such formal administrative complaint by a Regional Administrator of the National Labor Relations Board who is an arm of the office of the general counsel of the National Labor Relations Board since the 1947 Taft-Hartley Act amendments of the Wagner Act. This is especially apparent since the Administrative Procedure Act provisions found in 29 USCA Sec. 156, were also included in said 1947 Taft-Hartley Act amendment. Similarly, said interpretive rules and regulations found in 29 CFR 101.1 and 101.4-8 were promulgated by the National Labor Relations Board in consequence of

said 1947 amendment of 29 USCA, Sec. 156, and the inclusion of the last sentence of 29 USCA Sec. 160(b) with reference to the Federal Rules of Civil Procedure.

Thus it is apparent that compliance with the rules and regulations found in 29 CFR 101.1 and 101.4-8 are prerequisite to the jurisdiction of the Regional Administrator to the issuance of the complaint against the petitioner herein. Such non-compliance was alleged in petitioner's complaint in the U. S. District Court at Chicago, where the petitioner had to go to obtain personal jurisdiction of the defendants.

Notwithstanding the fact that persons may have no practical recourse in the courts for being subjected to unfounded, expensive and tedious litigation, whether administrative or judicial, if the denial of such Regional Administrator of petitioner's right to inspect and copy the investigation affidavits and documentary exhibits relevant to the charges being investigated so that the employer could reasonably participate in a Regional Administrator's investigation to insure his making a "full" investigation and reasonable efforts at settlement and mediation based on such Regional Administrator having the maximum available pertinent facts, Rule 29 CFR 101.4 so provides. It is petitioner's contention that such administrative denial, after exhaustion of administrative appellate procedure which the record discloses, was such an "adjudication" for which petitioner was entitled to judicial review by the United States District Court as sought by petitioner in its civil action herein sought to be instituted.

The main premise of petitioner is that the laws and regulations referred to entitled petitioner to commence a civil action to enforce the Regional Administrator's

compliance with the rules, regulations and statutes as herein sought in the U. S. District Court.

Reasonable men having the same or similar facts, usually come to similar conclusions respecting the significance of such facts. This is the basis for the entire anti-secrecy theory of Federal Court civil litigation obtained by the Federal Rules of Civil Procedure.

In *Hickman v. Taylor*, 1947, 329 U.S. 495, at 507, the Supreme Court said:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing-expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

The Congressional provision for the application of these Federal Rules of Civil Procedure has been disregarded by the Regional Administrator, as shown by the instant record.

This has denied petitioner the due process right of discovery provided in Rule 34, confrontation and cross-examination of the witnesses whose affidavit testimony and documentary exhibits in the possession of the Regional Administrator at a critical stage of labor peace and mediation has been denied to petitioner when it duly sought the same, and exhausted the administrative remedies provided in connection therewith and did not waive the same, before it commenced its civil action for judicial review in the U.S. District Court.

In *William L. Greene*, Petitioner, *v. Neil M. McElroy*, et al, 360 U.S. 477, 79 S. Ct. 1400, Argued April 1, 1959, Decided June 29, 1959. The Supreme Court in the ma-

jority opinion of Chief Justice Warren stated as follows:

"The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." Page 1412

* * *

* * * "(4, 5) Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots." Page 1413

* * *

"Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of

what the informant said without even examining the investigator personally." Pages 1414-1415

* * *

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." Page 1419

* * *

"These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." Page 1419

* * *

In further argument petitioner also refers to the following portion of the decision of the U. S. Supreme Court, issued on February 2, 1953, in the case of *Gordon v. United States*, 344 U.S. 414, at 420:

"For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error."

"Where practicable", in 29 USCA 160(b), should be construed as including the instant case where at the jurisdictional threshold of the National Labor Relations Board's attempt to obtain labor-peace and there is yet no adversary proceedings, and the administrative determina-

tion is whether there is insufficient support for the charge so that it should be dismissed, or whether there is a questionable support for the charge so that it should be settled, or that because there is an improper refusal to settle, and because there is a sufficient record of evidentiary support for the charge under the circumstances, a complaint procedure is then jurisdictionally supported, and such administrative "adjudication" should be subject to judicial review, after exhaustion of administrative appeal remedies.

Just as the Supreme Court in the *Jencks v. U. S.* case, 353 U.S. 657 stated that the attorneys for both parties were entitled to inspection of documents rather than merely the District Judge since the attorney for the defendant was best qualified to be able to detect relevancy and materiality in the statements (later separately to be considered) as evidence, so here it is fair to state that the refusal of the Regional Director of the National Labor Relations Board to honor Rule 34 of the F.R.C.P. at the initial record hearing on affidavit evidence constitutes improperly refusing to apply Rule 34, since it is practicable to do so.

In addition to 29 U.S.C.A. Section 156, on September 14, 1959 Congress added a special proviso, found in 29 U.S.C.A., Sec. 526, which included "adjudications" under the National Labor Relations Act to be subject to the Administrative Procedure Act. This would make 5 U.S.C.A., Sec. 1001-1011 (including 1009) applicable on which to base the independent jurisdiction of the district court to provide judicial review of such "adjudications", herein complained of.

2. **The holding of the Court below that a Regional Administrator's initial adjudication refusing right of inspection of affidavit testimony and documentary evidence on which settlement mediation is to be based and Board jurisdiction decided upon, may not be judicially reviewed by an independent equity suit in the Federal District Courts where no other feasible method of review is available before the Board's "final order" and the adjudication involved the Regional Administrator's disregard of a statutory requirement as well as of explicit Board regulation requirements "presents a substantial and important question", because the same is contrary to this Court's 1958 decision in *Leedom v. Kyne*.**

The investigation and mediation by the Regional Administrator of the charges of private parties seeking to invoke the formal assistance of the National Labor Relations Board is mandatory upon such Regional Administrator to his jurisdiction under the Statutes and Rules he is authorized to operate under.

In *Leedom v. Kyne*, the NLRB had argued that there was no right of judicial review in the U. S. District Court just as the defendants-appellees had contended below in the instant appeal.

Leedom v. Kyne should be authority for the non-application of *Myers v. Bethlehem Shipbuilding Corp. Ltd.* (303 U.S. 41), which was applied by the U.S. District Judge in dismissing plaintiff-appellant's complaint in the instant appeal.

In *Boyd S. Leedom, et al, v. William Kyne*, 358 U.S. 184, 79 S.C. Rep. p. 182, Mr. Justice Whittaker delivered the opinion of the Court.

"Section 9(b)(1) of the National Labor Management Relations Act, Sec. 9, 49 Stat. 453, 29 U.S.C. Sec. 159(b)(1), 29 U.S.C.A. Sec. 159(b)(1), provides that, in determining the unit appropriate for collective bargaining purposes, the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.' The Board, after refusing to take a vote among the professional employees to determine whether a majority of them would 'vote for inclusion in such unit,' included both professional and nonprofessional employees in the bargaining unit that it found appropriate. The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers."

* * *

"(2) 'Petitioners, members of the Board, concede here that the District Court had jurisdiction of the suit under Sec. 24(8) of the Judicial Code, 28 U.S.C. Sec. 1337, 28 U.S.C.A. Sec. 1337, unless the review provisions of the National Labor Management Relations Act destroyed it." * * *

* * *

* * * "It said: 'While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded * * *. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, * * *. The definite prohibition which Congress inserted in the act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement,

the conclusion must be that enforcement was contemplated'. Id., 281 U.S. at pages 568, 569, 50 S. Ct. at page 433. And compare *Virginian R. Co. v. System Federation*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789."

* * *

"Where, as here, Congress has given a 'right' to the professional employees it must be held that it intended that right to be enforced, and 'the courts * * * encounter no difficulty in fulfilling its purpose.'"

* * *

"(3-5) The record in this case squarely presents the question found not to have been presented by the record in *American Federation of Labor v. National Labor Relations Board, supra.* This case, in its posture before us, involves 'unlawful action of the Board (which) has inflicted an injury on the (respondent).' Does the law, 'apart from the review provisions of the * * * Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." pp. 183-184

* * *

Plaintiff by its complaint alleges that the action taken by the Regional Administrator denying its request to inspect the statements heretofore referred to is contrary to the applicable statutes and rules and regulations and is an unauthorized and indeed illegal act as well as an unwarranted abuse of administrative discretion; that rule

102.95 of the Rules and Regulations as to a party to proceedings before the Regional Administrator under which the Regional Administrator defends his refusal, is unauthorized by law and is unconstitutional in that it denies due process of law to this plaintiff and further is an unwarranted abuse of the rule making power given the National Labor Relations Board, under Section 6 of the National Labor Relations Act. (29 USCA Sec. 156)

Petitioner's record sets forth that it had exhausted the administrative remedies provided after the denial of its motion to inspect and copy under Rule 34 of the Federal Rules of Civil Procedure and after the denial of its motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure, because of the inadequate and insufficient compliance by the Regional Director with the jurisdictional requirements imposed upon him by 29 CFR Sections 101.1 and 101.4-8, before petitioner commenced its civil action in the district court.

Petitioner respectfully contends that the Court of Appeals erred in not following *Leedom v. Kyne* in its decision herein sought to be reviewed. In the District Court no reference was made to such decision in the District Court's opinion.

3. **The holding of the Court below is erroneous in applying this Court's 1938 *Myers v. Bethlehem Shipbuilding Corp. Ltd.'s* decision which therein excepted the question presented by the facts in the instant case.**

The dismissal of plaintiff's complaint in the instant case by the District Court was based on the interpretation by the District Court that the controlling authority was

this Court's opinion in *Myers v. Bethlehem Shipbuilding Corp. Ltd.* (303 U.S. 41)

The Court of Appeals followed the opinion of the District Court that the controlling opinion of the Supreme Court in construing the jurisdiction of the District Court was such 1938 decision of *Myers v. Bethlehem Shipbuilding Corp. Ltd.*

Petitioner contends that such application by the District Court and the Court of Appeals to the question of District Court jurisdiction of plaintiff's complaint was erroneous because of the reservation in the *Myers'* decision as follows:

> "First. There is claim by the corporation that the statutory provisi and the rules of procedure prescribed for such hearings are illegal; or *that the corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied.*"

Petitioner respectfully contends that the quotation from the 1938 Supreme Court decision precludes such decision from being properly deemed controlling in the instant case under the facts set forth in plaintiff's complaint and under the Statutes herein referred to and the Rules and Regulations herein referred to.

Factually and statutorily a different situation is here presented. Also the rules and regulations here involved were not present in the consideration of the Supreme Court in said *Myers'* decision. Therefore petitioner respectfully contends that the Court of Appeals and the District Court erred in applying such *Myers'* decision and in not following the ruling of this Court in *Leedom v. Kyne*, supra.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

H. WILLIAM IHRIG
759 North Milwaukee St.
Milwaukee 2, Wisconsin

MILTON GERWIN
EARL A. GLICK
1 N. La Salle Street
Chicago 2, Illinois

MAX RASKIN
PHILIP L. PADDEN
606 W. Wisconsin Ave.
Milwaukee 3, Wisconsin

Attorneys for Petitioner
VAPOR BLAST
MANUFACTURING COMPANY

Date: September 27, 1960.

APPENDIX I-a

JUDGMENT OF COURT OF APPEALS ENTERED JUNE 30, 1960

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX I-b

DECISION OF COURT OF APPEALS FOR SEVENTH CIRCUIT

June 30, 1960

Before HASTINGS, *Chief Judge*, DUFFY and KNOCH, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is an appeal from an order of the district court dismissing a complaint for declaratory judgment filed by plaintiff-appellant, Vapor Blast Manufacturing Company (Company), against defendants-appellees, Ross M. Madden, individually and as Regional Director of Region 13, National Labor Relations Board (Board), and Gerald S. Patterson, individually and as counsel for the office of the General Counsel of the Board. The basis of the dismissal was that the court had no jurisdiction over the subject matter of the complaint.

The Company is a Wisconsin corporation, located in Milwaukee, engaged in the business of engineering, manufacturing and selling certain equipment, parts and supplies. In October and November, 1958, six unfair labor practice charges against the Company were filed with Madden, as Regional Director of the Board. Madden commenced an investigation of the charges pursuant to Board rule, 29 U.S.C.A. App. § 101.4. As part of this investigation, certain questions relating to the charges were subinitted to several management officials of the Company. Although the questions were answered, the Company contends it was not able to answer fully and fairly because of Madden's denial of its request to inspect the affidavits of witnesses supporting the charges supplied to and in possession of the Board. On March 24, 1959, an unfair labor practice complaint was issued

against the Company based upon the result of the administrative investigation of the charges. Early in May, 1959, the Company appealed to the General Counsel of the Board from Madden's denial of an opportunity to inspect the documents in question and from his additional denial of a motion to dismiss the charges due to insufficient evidence. In addition, the Company applied to the General Counsel for permission to inspect the affidavits considered by Madden in his investigation of the unfair practice charges. On May 25, 1959, the General Counsel rejected the Company's appeal and denied its separate application for inspection.

Prior to the unfair practice hearing scheduled for June 2, 1959, the Company filed in the district court a petition for a temporary order restraining the hearing. The order was denied because the Company failed to show irreparable injury. In addition, in a complaint for declaratory judgment the Company asked that the court declare the Company's right to inspect the affidavits in question and, after inspection, to reply to the allegations made therein in the course of what would be, in effect, a review by Madden of the substantiality of the charges. In addition, the Company asked to have the unfair practice complaint held in abeyance during such review.

The unfair practice hearing was held as scheduled. The case has progressed within the administrative framework of the Board; and on January 12, 1960, the Board issued its decision finding that the Company had committed certain unfair labor practices and requiring appropriate remedial action. *Vapor Blast Manufacturing Co.*, 125 NLRB No. 6, 45 L.R.R.M. 1271.

On October 14, 1959, upon consideration of briefs the district court ordered the dismissal of the Company's

declaratory judgment complaint on the ground that it had no jurisdiction over the subject-matter. This order is the basis of the present appeal.

The Company's central substantive position is that the denial of inspection of the affidavits in the Board's possession irreparably injured it because of its inability to reply adequately to the charges and the complaint and to prepare fully for the unfair practice hearing. It states that the discovery it seeks is authorized by Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and it is noted that Section 10(b) of the Labor-Management Relations Act, 1947, 29 U.S.C.A. § 160(b) (the Act), requires that unfair labor practice proceedings "so far as practicable [shall] be conducted in accordance with the rules of evidence applicable in the district courts of the United States." The Company contends that the rules of the Board which allowed the Board to suppress the documents in question here are invalid and unconstitutional. The operation of all these factors, allegedly, deprived the Company of its due process rights to a full and fair proceeding.

The Board answers that the district court had no jurisdiction over the subject matter of this case; that the General Counsel, not joined here, is an indispensable party to the action and therefore the court lacked jurisdiction over the case; and that, in any event, the action and rules attacked here were reasonable and did not deprive the Company of its constitutional rights.

The substantive questions raised by the Company have been at issue in several recent cases before this court.[1]

[1] *E.g., Kiekhaefer Corporation v. National Labor Relations Board*, 7 Cir., ... F. 2d .... (January 5, 1960); *Madden v. International Hod Carriers' Building and Common Laborers' Union of America, Local No. 41, AFL-CIO*, 7 Cir., ... F. 2d .... (May 11, 1960).

but in each of these cases the procedural posture was such that we did not reach the issue. For the reasons explained, *infra*, again in this case we do not determine the substantive question.

In this and similar actions, parties to Board proceedings have attempted to secure examination of documents in the Board's files. However, in Section 102.94(b), 29 U.S.C.A. App., the Board has found confidential and not available to public inspection all evidence collected by the Board (with limited exceptions discussed, *infra*) and all files, documents, reports, memoranda and records pertaining to the Board's internal management or to the investigative stage of proceedings. The rule makes provision for inspection upon the permission of the Board, its chairman, the general counsel, or any regional director.[2] Lacking such permission, Board employees are prohibited from producing the files and related documents pursuant to a subpoena *duces tecum* or from testifying as to their contents and are instructed to move to quash such subpoena on the ground that the evidence is privileged against disclosure. See Sections 102.95, 102.31 and 102.66, 29 U.S.C.A. App.

This rule was relaxed subsequent to the decision of the Supreme Court in *Jencks v. United States*, 353 U.S. 657 (1957). The court of appeals, in *National Labor Rel. Bd. v. Adhesive Products Corp.*, 2 Cir., 258 F. 2d 403 (1958), applied the *Jencks* rule to a non-confidential statement sought to be examined in the course of Board proceedings. In turn, the Board, in *Ra-Rich Manufacturing Corporation*, 121 NLRB 700 (1958), reversed its

---

[2] The necessity of making such request is emphasized in *National Labor Rel. Bd. v. General Armature & Mfg. Co.*, 3 Cir., 192 F. 2d 316 (1951) and *National Labor Rel. Bd. v. Jamestown Sterling Corp.*, 2 Cir., 211 F. 2d 725 (1954).

prior position[3] and held that it would adhere to what was, in effect, the *Jencks* rule to allow examination of a witness's prior statement for the purpose of impeachment.[4] Examination of Board documents, therefore, was limited to Board consent or to a situation where a witness might be impeached by his prior statement.

The Company here, however, asserts that applicable statutes and due process require even more broad rights of examination—discovery not only for impeachment, but also more generally to aid it in the preparation of its case.[5]

We do not reach the resolution of the substantive issue here.[6] We must first determine whether it was proper to raise this issue in a direct action in a district court while

---

[3] *The Great Atlantic and Pacific Tea Company*, 118 NLRB 1280 (1957). *Cf. National Labor Relations Board v. Thayer Co.*, 1 Cir., 213 F. 2d 748, 758 (1954); *National Labor Relations Board v. T. W. Phillips Gas & Oil Co.*, 3 Cir., 141 F. 2d 304, 306 (1944).

[4] Section 102.95, 29 U.S.C.A. App., provides:

> "• • • after a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken."

[5] For the necessity of a party's showing a "need" for the discovery of documents in Board possession, see *National Labor Relations Bd. v. Quest-Shon Mark B. Co.*, 2 Cir., 185 F. 2d 285, 289-90 (1950); *Poinsett Lumber and Manufacturing Company*, 109 NLRB 1079, 1084 (1954); *International Broadcasting Corporation (KWKH)*, 102 NLRB 1434, 1435-36 (1953); *Standard Coil Products, Inc.*, 99 NLRB 899, 900 (1952). *But cf.*, "There is no provision in the Act authorizing the use of the discovery procedure." *National Labor Relations Board v. Globe Wireless*, 9 Cir., 193 F. 2d 748, 751 (1951).

[6] The constitutional validity of the Board's rule making its documents confidential against general discovery has been affirmed in

Board action was pending or whether the issue, if saved, must properly be considered by the court of appeals in a normal review of Board action as contemplated by Section 10(e) of the Act, 29 U.S.C.A. § 160(e).

We hold that the district court properly dismissed the complaint for lack of jurisdiction over the subject matter.

The review provisions of the Act, 29 U.S.C.A. 160(e) and (f), provide adequate and full opportunity for the Company to raise the contentions it tendered in its complaint in the district court. Under the provisions of Section 10(e) of the Act, in an enforcement proceeding the Company may put in issue the question of whether it was deprived of its rights to procedural due process by the Board's action of suppressing the documents in question.

District courts possess general jurisdiction under the provisions of 28 U.S.C.A. § 1337 unless the review provisions of the Act destroy it. *Leedom v. Kyne*, 358 U.S. 184, 187 (1958). And in certain instances, a district court's jurisdiction will be invoked, thereby precluding exclusive review by the provisions of the Act. *Leedom v. Kyne, supra.*[1] However, with full judicial review available upon a petition for enforcement, the Company has presented no circumstances indicating that it will suffer an irreparable injury which would invoke the power of an equity decree compelling the Board to disclose the documents in question. The sole immediate injury of which the Company has complained is its expense in de-

---

National Labor Relations Board v. Chambers Manufacturing Corporation, 5 Cir., ... F. 2d .... (May 31, 1960) and *Biazevich v. Becker*, D.C.S.D. Cal. 161 F. Supp. 261 (1958). See also *Raser Tanning Company v. N.L.R.B.*, 6 Cir., 276 F. 2d 80 (1960).

[1] See discussion of the power of the district court to enforce interunion contract provisions in *N.L.R.B. v. Weyerhaeuser Company*, 7 Cir., 276 F. 2d 865, 874-75 (1960).

fending against the unfair labor practice complaint. But, as was stated in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 51-52 (1938), "the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The *Myers* case, *supra*, is authority for the path we follow here. There, employer-respondent in an unfair labor practice case alleged that its business did not affect commerce and therefore the commerce power of Congress and, in turn, the Board did not extend to its manufacturing operations. Rather than raise this issue before the Board, employer obtained a temporary injunction from a district court restraining Board proceedings. The Supreme Court held that Congress had intended that this jurisdictional fact should first be determined by the Board subject to review by the proper court of appeals; and prior to the exhaustion of the remedies provided by the Act, a district court could not interfere with Board proceedings.

The Company strenuously attempts to distinguish *Myers* on the ground that Board procedures were not an issue in that case. We agree with this factual distinction. But merely raising a constitutional issue in its complaint for declaratory judgment, when full appellate review of the administrative proceedings is available and in the absence of any extenuating circumstances, is insufficient to give the district court jurisdiction over the subject matter in the face of the well-established doctrine of exhaustion of administrative remedies. *Elm City Broad-*

casting Corp. v. National Labor Rel. Bd., D.C. Conn., 123 F. Supp. 838, 840 (1954).* For cases similar to the instant case, where district courts have refused to intervene in Board proceedings, see *N.L.R.B. v. Erkkila*, D.C.N.D. Cal., 35 CCH Lab. Cas. ¶ 71,650 (1958); *Biazevich v. Becker*, D.C.S.D. Cal., 161 F. Supp. 261 (1958); *Cf. Thompson Products v. National Labor Rel. Board*, 6 Cir., 133 F. 2d 637 (1943).

We reject the Company's contention that the determination by Madden to file an unfair practice complaint is an adjudication subject to intermediate judical review under Section 9 of the Administrative Procedure Act, 5 U.S.C.A. § 1009. The decision to file such complaint here is an example of the "preliminary, procedural, or intermediate agency action * * * subject to review upon the review of the final agency action." Section 1009(c), *supra*.

Because of our disposition of the case in the manner described, we do not reach the question of whether the General Counsel is an indispensable party to this action.

The order of the district court dismissing the complaint for declaratory judgment is

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

---

* A district court had jurisdiction to review a certification proceeding where it was alleged that the lack of a hearing unconstitutionally deprived the incumbent union of property rights. There, rights of judicial review were not directly available. *Fay v. Douds*, 2 Cir., 172 F. 2d 720, 723 (1949). *Cf. Fitzgerald v. Douds*, 2 Cir., 167 F. 2d 714 (1948).

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
* * (Caption — No. 59 C 873) * *
(Filed Oct. 30, 1959)

TRANSCRIPT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, sitting in his court room in the United States Court House at Chicago, Illinois, on Wednesday, October 14, A.D. 1959, at 10:00 o'clock A.M.

Present:
Earl A. Glick, Esq.,
appeared on behalf of plaintiff;
William J. Cavers, Esq.,
appeared on behalf of defendant.

The Clerk: 59 C 873, Vapor Blast Manufacturing Company vs. Ross M. Madden, decision on defendant's motion to dismiss complaint.

The Court: Good morning, gentlemen. I have asked you to come in here so that I can give you my views in respect to the motion of the defendants to dismiss.

It appears that this action was instituted by the Vapor Blast Manufacturing Company against Ross M. Madden, the Regional Director of the National Labor Relations Board, and others for declaratory judgment, and that the Board has moved to dismiss the complaint.

The complaint alleges that in the Fall of 1958, charges were filed with the Board alleging the commission of unfair labor practices by the plaintiff, and an investigation was conducted by the Board. In the course of this investigation, the plaintiff submitted to the Regional Di-

rector of the Board a written statement of its position with respect to the allegations of the charges and filed a motion to dismiss the charges.

The plaintiff also filed a request to inspect and copy all affidavits and statements of witnesses obtained by the Board during its investigation of the charges. The Regional Director denied the motion to dismiss the charges and declined the plaintiff's request to copy the affidavits and statements.

Thereafter the Regional Director issued a complaint against the plaintiff, and the plaintiff answered and specifically reserved the right to protest the failure of the Regional Director to produce the requested affidavits and statements. Thereafter the plaintiff filed separate documents with the General Counsel of the Board appealing the denial of the motion to dismiss and the denial of the request to produce the affidavits and statements.

Both appeals were denied by the General Counsel.

Upon the denial of the appeal, a hearing on the unfair labor practice charges was set for June 2nd, 1959. Thereupon, the plaintiff moved for a preliminary injunction. On June 1st, 1959, the plaintiff moved for a preliminary injunction to restrain the proceedings with respect to the unfair labor practice charges.

The motion for a preliminary injunction was denied on the grounds that the plaintiff had failed to show irreparable injury and that the need for a preliminary injunction was speculative.

The Court was then asked by counsel for the plaintiff if it might amend its complaint and set forth more fully its claim for declaratory relief. The plaintiff was granted this opportunity, but the complaint has not been amended and the Board has now moved to dismiss the action.

The complaint asserts that the Board's refusal to make the affidavits and statements it procured during its investigation available to the plaintiff was contrary to law and in violation of the Fifth Amendment as a deprivation of due process.

The plaintiff asserts that unless these documents are produced, it will not have a fair opportunity to respond to the charges made against it at the unfair labor practice hearing.

Following the denial of the plaintiff's request for a preliminary injunction, the unfair labor practice hearing was held as scheduled on June 2nd, 1959, and the matter is presently under advisement with the Trial Examiner. There has been no final decision rendered in the National Labor Relations Board proceeding at this time.

In support of its motion to dismiss, the Board asserts that this court is without jurisdiction over the subject matter of this action; that the General Counsel of the Board is an indispensable party to this action; and that, in any event, the rulings of which the plaintiff complains are reasonable and proper.

The contention that this Court does not have jurisdiction over the subject matter of this action is based upon the assertion that the declination of the request, or, rather, the refusal of the request to copy certain affidavits is not a final decision, and is, therefore, not reviewable by a District Court.

The plaintiff asserts that this Court has proper jurisdiction under the general equity jurisdiction of the Court. Thus, the question for decision is whether a Federal District Court has equity jurisdiction to enjoin or set aside a National Labor Relations Board hearing upon

a complaint filed by it and against an employer when the Board refuses to produce affidavits and statements for inspection by the employer and such refusal is alleged to be unconstitutional.

The resolution of this question necessitates a discussion of the doctrine of exhaustion of administrative remedies. This doctrine has been defined as the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *Meyers vs. Bethlehem Shipbuilding Corporation*, 303 U. S. 41 at pages 50 and 51, decided by the Supreme Court in 1938.

Although the doctrine appears to be clear and have simple application, the Courts have often provided judicial relief although the administrative remedies have not been exhausted. *3 Davis, Administrative Law Treaties*, Section 20.01, 1958.

However, this case does not call for a detailed discussion of these decisions because the question for decision is resolved by the *Meyers* case to which I have previously referred.

In that case the Board issued a complaint against Bethlehem Shipbuilding Corporation alleging that Bethlehem had engaged in unfair labor practices. Bethlehem filed a bill in equity in the Federal District Court to restrain the Board from proceeding with the hearing and to have the National Labor Relations Act declared unconstitutional. The Trial Court issued a preliminary injunction which was affirmed by the Court of Appeals. *Meyers vs. Bethlehem Shipbuilding Corporation*, 88 F. 2d 154, decided by the First Circuit in 1937. The Supreme Court reversed the action of both the Court of

Appeals and the Trial Court and directed that the suit be dismissed. The Supreme Court stated that Bethlehem's contention that the Trial Court had jurisdiction to prevent an irreparable injury and a denial of constitutional rights "is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until tl prescribed administrative remedy has been exhausted." Again from pages 50 and 51.

The Supreme Court said at page 51:

> "Obviously the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the mere holding of a prescribed hearing would result in irreparable damage."

The Supreme Court pointed out also that the review of the determinations of the National Labor Relations Board proceedings was provided for by statute and fully adequate.

The principles in the *Meyers vs. Bethlehem* case are applicable to the case at bar. Any determination by this Court of the issues presented by the plaintiff's complaint would contravene the doctrine of exhaustion of administrative remedies. Further, the issues presented by the complaint call for relief which is wholly speculative. *Whitehouse vs. Illinois Central Railroad Company*, 348 U.S. 366, decided by the Supreme Court in 1955; *Union Railroad Company vs. National Railroad Adjustment Board*, 170 Fed. Supp. 281, decided by this Court in 1958.

The Hearing Examiner has not as yet issued his report on the National Labor Relations Board proceeding, and any determination by this Court of the constitutionality of the refusal by the Board to produce the

documents which the plaintiff seeks would be anticipatory and without meaning in the event the Trial Examiner should rule in favor of the plaintiff.

It is my view that this Court is without jurisdiction over the subject matter of the complaint. Thus, the necessity for determining any other issues presented by the parties is obviated.

The motion of the defendants to dismiss is granted pursuant to Rule 8(b) (1) of the Federal Rules of Civil Procedure. The complaint will be dismissed, Mr. Clerk.

APPENDIX III

STATUTES

5 USCA, Section 22

"22. Departmental regulations; withholding of information from public not authorized.

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use and preservation of the records, papers and property appertaining to it. This section does not authorize withholding information from the public or limiting the availability of records to the public. As amended Aug. 12, 1958, Pub. L. 85-619, 72 Stat. 547."

5 USCA, Section 1009 (d) and (e)

"(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclu-

sions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determination the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

5 USCA, Sec. 1011. "Impairment of rights; effect on other laws; separability; subsequent legislation; effective date.

"Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. * * * "

28 USCA, "Sec. 1254. Courts of Appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

28 USCA, Sec. 1331

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in con-

troversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 USCA, Sec. 1337

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

28 USCA, Sec. 1343 (4)

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 USCA, Sec. 2072

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

* * *

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported."

28 USCA, Sec. 2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have

the force and effect of a final judgment or decree and shall be reviewable as such."

Sec. 2202 — "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

29 USCA, Sec. 156

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

29 USCA, Sec. 160 (b)

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint."

" * * * The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

" * * * *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.*"

29 USCA, Sec. 160 (e)

(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before

the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28."

29 USCA, Sec. 160 (f)

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive

jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

29 USCA, Sec. 526

"The provisions of the Administrative Procedure Act shall be applicable to the issuance, amendment, or rescission of any rules or regulations or any adjudication, authorized or required pursuant to the provisions of this chapter. Pub. L. 86-257, Title VI, para. 606, Sept. 14, 1959, 73 Stat. 540.

"References in Text: 'This Chapter' referred to in the text, was in the original 'this Act' meaning Pub. L. 86-257 which added this chapter and amended sections 153, 158, 159, 160, 164, 186 and 187 of this title.

"(The Administrative Procedure Act, referred to in the text, is classified to Chapter 19 of Title 5, Executive Departments and Government Officers and Employees.)"

APPENDIX IV

RULES AND REGULATIONS OF NATIONAL LABOR RELATIONS BOARD (29 CFR)

RULE 101.1

"101.1. By virtue of the authority vested in it by the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act 1947 (Sec. 101, 61 Stat. 136; 28 USCA 151 et seq.) the National Labor Relations Board has issued and caused to be published in the FEDERAL REGISTER simultaneously herewith, Part 102 (Rules and Regulations, Series 5) of this Chapter, which it has found necessary, as provided in section 6 of the National Labor Relations Act, to carry out the provisions of that Act. Part 102 of this Chapter states the general rules of procedure followed by the Board in administering its functions. The following statements of the general course and method by which the Board's functions are channeled and determined, issued and published as provided in sections 3 (a) (2) of the Administrative Procedure Act, amplify and supplement the rules of procedure."

RULE 101.4

"101.4. When the charge is received in the Regional Office it is filed, docketed, and assigned a case number. The Regional Director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the General Counsel or his agents. The Regional Director requests the person filing the charge to submit evidence in its support. The person against whom the charge is filed, called the respondent in this part, is asked to submit a written statement of his

position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b) (4) (A), (B), and (C) are given priority over all other cases in the office in which they are pending except cases of like character and charges alleging violation of section 8(b) (4) (D) are given priority over all cases except section 8(b) (4) (A), (B), and (C) cases and other cases alleging violation of section 8(b) (4) (D). After full investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first."

RULE 101.5

"101.5. If investigation reveals that there has been no violation of the National Labor Relations Act, or the evidence is insufficient to substantiate the charge, the regional director recommends withdrawal of the charge by the person who filed. The complainant may also, on its own initiative, request withdrawal. If the complainant accepts the recommendation of the Director or requests withdrawal on its own initiative, the respondent is immediately notified of the withdrawal of the charge."

RULE 101.6

"101.6. If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the General Counsel in Washington within 10 days. If the com-

plainant appeals to the General Counsel, the entire file in the case is sent to Washington where the case is fully reviewed by the General Counsel with the assistance of his staff. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds on his affirmance, or may direct the Regional Director to take further action."

RULE 101.7

"101.7. Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment, except where time, the nature of the proceeding and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the Regional Director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the Regional Director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the Regional Director may determine to institute formal proceedings."

RULE 101.8

"101.8. If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discre-

tion of the general counsel, must submit the case for advice from the general counsel before issuing complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a statement of its defense."

Sec. 102.94

"102.94. *Files, records, etc., in exclusive custody of Board and not subject to inspection; formal documents and final opinions and orders subject to inspection.*—(a) The formal documents described as the record in the case or proceeding and defined in sections 102.45, 102.67, and 102.69 are matters of official record and are available for inspection and examination by persons properly and directly concerned, during usual business hours, at the appropriate regional office of the Board or in Washington, D. C. as the case may be. True and correct copies thereof will be certified upon submission of such copies a reasonable time in advance of need and payment of lawfully prescribed costs: *Provided, however,* That if the Board, the general counsel, or the regional director with whom the documents are filed shall find in a particular instance good cause why a matter of official record should be kept confidential, such matter shall not be available for public inspection or examination. Application for such inspection, if desired to be made at the Board's office in Washington, D. C., shall be made to the executive secretary or the general counsel, as the case may be, and, if desired to be made at any regional office shall be made to the regional director. The executive secretary, the general counsel, or the regional director may, in his discretion, require that the application be made in writing and under oath and set forth the facts upon which the applicant relies to show that he is properly and directly concerned with such in-

spection and examination. Should the executive secretary, the general counsel, or the regional director, as the case may be, deny any such application, he shall give prompt notice thereof, accompanied by a simple statement of procedural or other grounds.

"(b) All final opinions or orders of the Board in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and its Rules and Regulations are available to public inspection during regular business hours at the Board's offices in Washington, D. C. Copies may be obtained upon request made to any regional office of the Board at its address as published in the Federal Register, or to the director of information in Washington, D. C. Subject to the provisions of sections 102.31 and 102.66 all files, documents, reports, memoranda, and records pertaining to the internal management of the Board or to the investigation or disposition of charges or petitions during the nonpublic investigative stages of proceedings and before the institution of formal proceedings, and all matters of evidence obtained by the Board or any of its agents in the course of investigation, which have not been offered in evidence at a hearing before a trial examiner or hearing officer or have not been made part of an official record by stipulation, whether in the regional offices of the Board or in its principal office in the District of Columbia, are for good cause found by the Board held confidential and are not matters of official record or available to public inspection, unless permitted by the Board, its chairman, the general counsel, or any regional director.

Sec. 102.95

"Same; Board employees prohibited from producing files, records, etc., pursuant to subpena ad testificandum or subpena duces tecum, prohibited from testifying in regard thereto.—No regional director, field examiner, trial examiner, attorney, specially

designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, *subpena duces tecum*, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any *subpena ad testificandum* or *subpena duces tecum*, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpena invalidated, on the ground that the evidence sought is privileged against disclosure by this rule:—*Provided*, after a witness called by the general counsel has testified in a hearing upon a complaint under Section 10 (c) of the Act the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken."

APPENDIX V.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 12.

"Rule 12. (b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

"Rule 12. (c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

"Rule 12. (d) Preliminary hearings. The defenses specifically enumerated (1)-(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

"Rule 12. (g) Consolidation of Motions. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this

rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

"Rule 12. (h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

"Rule 34. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.*

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)

and which are in his possession custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, effective March 19, 1948."

APPENDIX VI

U.S. CONSTITUTION — AMENDMENT V

"No person shall be * * * deprived of life, liberty or property without due process of law;" * * *